



No. 13

March 5, 2003

Treaty Doc. 107-8 – The Moscow Treaty

Executive Calendar No. 1

The Treaty and resolution of advice and consent to ratification (with two conditions and six declarations) were reported favorably by the Committee on Foreign Relations on February 20, 2003, by a vote of 19-0; printed Ex. Rept. 108-1. The treaty is pending on the Executive Calendar (Calendar No. 1).

NOTEWORTHY

- On March 4, a unanimous consent agreement was reached to begin consideration of the Moscow Treaty at noon on March 5 with relevant amendments in order. The consent agreement contains no time limitation.
- Under Article II, section 2, of the U.S. Constitution, the Senate must give its advice and consent to treaties made by the Executive Branch before the United States incurs binding obligations. Two-thirds of Senators present and voting must agree to approve the resolution of ratification.
- The Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (“the Moscow Treaty” or “SORT”) was concluded in Moscow on May 24, 2002. Two elements at the heart of the proposed treaty are that each party must (1) reduce its respective aggregate number of strategic offensive nuclear warheads to a range of 1,700 to 2,200 and (2) perform this obligation on/before December 31, 2012.
- The Foreign Relations Committee recommends the Senate give its advice and consent to the ratification of the Moscow Treaty, subject to the two conditions in section 2 and the six declarations in section 3 [for details, see pps. 10-11 of this Notice].
- Senator Levin (chairman of the Armed Services Committee in the 107th Congress), who provided recommendations for the resolution of ratification in a letter to the Foreign Relations Committee last year [see Ex. Rept. 108-1, pp. 15-17], may offer amendments. Senator Feingold may also offer an amendment. (See Possible Amendments section.)

BACKGROUND

On June 20, 2002, Treaty Document 107-8 was received in the Senate and referred to the Committee on Foreign Relations by unanimous consent. On February 20, 2003, the Committee on Foreign Relations – after holding hearings in July and September of 2002 – reported the Moscow Treaty to the full Senate favorably with a recommended resolution of ratification. [See Exec. Rpt. 108-1 for Committee action, and S. Hrg. 107-622 for related hearing transcripts. See Treaty Doc. 107-8 for the Executive Branch treaty transmittal package, which includes the text of the treaty. Note also that the United States and Russia also concluded a Joint Declaration of May 24, 2002 on the Moscow Treaty, but it did not form part of the treaty package transmitted to the Senate.]

The Moscow Treaty: A Break With the Past

The Moscow Treaty represents a break with the past in terms of arms control policy because it simply memorializes what President Bush had determined, prior to conclusion of the Treaty, are to be the U.S. requirements and what President Putin determined to be Russian requirements. U.S. ratification of the Treaty is one part of a new overall approach to strategic security: combined with U.S. withdrawal from the Anti-Ballistic Missile Treaty in 2002, and Senate disapproval of the Comprehensive Test Ban Treaty in 1999, it is a fundamental shift away from traditional arms control agreements in the direction of reliance on U.S. capabilities (e.g., deterrence and missile defense) and treatment of Russia as a country with whom the United States has a normal, not hostile, relationship.

“This treaty liquidates the Cold War legacy of nuclear hostility between our two countries,” said President George Bush at the treaty’s Kremlin signing ceremony on May 24, 2002.

Moscow Treaty Status in the Russian Duma

The Russian Duma must approve the Moscow Treaty before it will bind the Russian Federation. According to the Department of State, the Duma has taken up the Treaty but has not yet approved it. There is no indication of substantive concerns about the Treaty in the Duma. The Duma’s foreign relations committee reportedly has followed the Moscow Treaty’s rapid progress in the U.S. Senate with interest, but it is expected to wait until after the Senate approves the Treaty to take final action.

HIGHLIGHTS

Summary of Treaty Text¹

Article I

Article I contains the central Treaty obligation, namely, that both parties “reduce and limit strategic nuclear warheads ... so that by December 31, 2012 the aggregate number of such warheads does not exceed 1,700-2,200 for each Party.” The Article also provides that each party “shall determine for itself the composition and structure of its strategic offensive arms.”

According to the Foreign Relations Committee Report (citing Administration sources) which accompanies the Treaty, for U.S. purposes,

“‘the unit of account for the Moscow Treaty shall be *operationally deployed strategic nuclear warheads* (emphasis added),’ which [the Administration] defines as ‘reentry vehicles on intercontinental ballistic missiles (ICBMs) in their launchers, reentry vehicles on submarine-launched ballistic missiles (SLBMs) in their launchers aboard submarines, and nuclear armaments loaded on heavy bombers or stored in weapons storage areas of heavy bomber bases.’ According to the Administration, the Russian Federation will establish its own definition of ‘strategic nuclear warhead’ as it carries out its reductions under the Treaty.”²

Article II

This Article acknowledges the continued existence of the 1991 five-party Strategic Arms Reduction Treaty (START I). START I established its own comprehensive verification regime. The relationship between the Moscow Treaty and START I is important. For the Moscow Treaty, the Administration intends to rely on the existing START I verification mechanism, which will remain in force until December, 2009. If the START I verification regime is not extended beyond 2009, the Moscow Treaty gives the parties needed flexibility to make other arrangements.

¹For complete Treaty text, see Treaty Doc. 107-8, p. 1.

²Exec. Rep. 108-1, p. 8.

According to Secretary Powell's Letter of Submittal to President Bush, "START's comprehensive verification regime will provide the foundation for confidence, transparency and predictability in further strategic offensive reductions" for the Moscow Treaty.³ The United States and Russia will explore other ways to enhance transparency and predictability.

Article III

This Article establishes a Bilateral Implementation Commission, which shall meet at least twice a year for "purposes of implementing this Treaty." A Joint Declaration released at the Moscow Summit on May 24, 2002, calls for the creation of a Consultative Group for Strategic Security as "the principal mechanism through which the sides strengthen mutual confidence, expand transparency, share information and plans, and discuss strategic issues of mutual interest."⁴

Article IV

Article IV stipulates that the Treaty remain in force until December 31, 2012. The Parties may extend the Treaty or supersede it with another Treaty at any time. This Article also stipulates that either party may withdraw from the Treaty after providing three months' notice "in exercising its national sovereignty." This is an important departure from past practice, because it does not require an assertion that extraordinary circumstances jeopardizing supreme national interests exist to justify withdrawal. This provision gives both parties substantial additional flexibility to confront situations that might require withdrawal, but have nothing to do with matters arising between the parties.

Article V

This Article includes a standard provision for registration of international treaties pursuant to Article 102 of the Charter of the United Nations.

³Treaty Doc. 107-8, p. VI.

⁴See http://www.usembassy.it/file2002_05/alia/a2052403.htm for text of Joint Declaration.

Items for Discussion

Cooperative Threat Reduction

The Moscow Treaty does not address the Nunn-Lugar Cooperative Threat Reduction (CTR) program, but the Administration has indicated that it is prepared to extend CTR assistance to Russia to carry out the objectives of the Treaty.

The CTR program's objectives are to cooperate with Russia and other former Soviet republics to safeguard and destroy weapons of mass destruction, and to establish verifiable safeguards against their proliferation. The program was established in an amendment to the implementing legislation for the Conventional Armed Forces In Europe Treaty (P.L. 102-228).⁵ Among other provisions, the CTR program requires an annual Executive Branch certification that recipients are committed to a series of arms control and human-rights-related standards.⁶

The United States commits nearly \$1 billion annually to Cooperative Threat Reduction and nonproliferation programs in Russia, and recently spearheaded the G-8 Leaders' *Global Partnership Against the Spread of Weapons and Materials of Mass Destruction*,⁷ in which it committed \$10 billion over the next 10 years for Russian nonproliferation and disarmament programs. A serious obstacle to U.S. nonproliferation efforts in Russia is access to Russian facilities. According to a March 4, 2003 press report, the General Accounting Office has prepared a report on the program concluding, among other things, that "Russia is not providing needed access to many of the sites ... [and] ... [u]nfortunately, there is little reason to believe this situation will change in the near future."⁸ In addition, Russian firms apparently also continue to provide arms and sensitive technologies and materials to countries like Iran and Iraq.

In a written reply to a Committee question on the Moscow Treaty and CTR for the July 9, 2002 hearing record, Secretary of State Powell said:

⁵ See CRS Report 94-985, *The Nunn-Lugar Program for Soviet Weapons Dismantlement: Background and Implementation*.

⁶At the July 7, 2002, hearing on this Treaty, Secretary Powell and the Foreign Relations Committee discussed a permanent waiver of this provision (see S.Hrg. 107-622, pp. 25-27), but a waiver for a single year only was approved in the Defense Appropriations Act for FY 2003.

⁷For text, see <http://www.state.gov/e/eb/rls/othr/11514.htm>.

⁸See "Russian Arms Safeguards Found Lacking," by Joby Warrick, *The Washington Post*, March 4, 2003 at <http://www.washingtonpost.com/wp-dyn/articles/A37068-2003Mar3.html> and also "Wasteful Threat Reduction in Russia," by Duncan Hunter, *The Washington Post*, March 4, 2003 at <http://www.washingtonpost.com/wp-dyn/articles/A37560-2003Mar3.html>.

“The possibility of further CTR assistance [to Russia] in implementing the Moscow Treaty has not been specifically discussed with the Russian Federation. However, the CTR program already includes funding in the outyears to support deep reductions in Russian strategic nuclear delivery systems and their associated warheads. The Administration is prepared to extend CTR assistance, as required, to support the secure transport, storage and elimination of delivery vehicles and warheads under the Moscow Treaty, although there are no requirements related to this in the Moscow Treaty.”⁹

The Foreign Relations Committee noted in its Report on the Moscow Treaty that Executive Branch witnesses continually highlighted CTR as “the primary means” to prevent weapons and related material in Russia from falling into terrorist hands. The Report also notes:

“[The] Nunn-Lugar Cooperative Threat Reduction and non-proliferation assistance to the Russian Federation could play a crucial role in helping Russia to implement the reductions required by Article I of the Moscow Treaty. Senator Lugar made the point that U.S. assistance might well affect Russian decisions regarding the disposition of warheads or of strategic delivery vehicles.”¹⁰

Both during hearings on the Treaty and in the Committee-recommended resolution of ratification (see below), the Foreign Relations Committee made clear its expectation that the Administration will offer CTR assistance to Russia to meet the objectives of the Moscow Treaty.

MIRVed Intercontinental Ballistic Missiles

The Moscow Treaty permits Russia to continue to maintain intercontinental missiles (ICBMs) capable of carrying multiple independently-targeted reentry vehicles (MIRV), but the Administration does not consider this cause for concern that the Treaty will leave the United States inadequately defended. At the July 9, 2002, hearing on the Treaty, in his prepared statement, Secretary Powell said:

“Since neither the United States nor Russia has any incentive to launch nuclear weapons at each other, we no longer view Russian deployment of MIRVed ICBMs as destabilizing to our strategic relationship.”¹¹

Regarding the MIRVed ICBM question, General Richard B. Myers, USAF, Chairman of the Joint Chiefs of Staff, speaking at the Foreign Relations Committee hearing on the Treaty, said:

⁹S. Hrg. 107-622, p. 55.

¹⁰Exec. Rpt. 108-1, p. 18.

¹¹S. Hrg. 107-622, p. 18.

“We are comfortable with our capability to defend this Nation, ... Where we are – we are not worried about it. Where we are, we are confident we can defend the country.”¹²

In a reply to a written question for the record on MIRVed ICBMs, Secretary Rumsfeld and General Myers wrote jointly:

“Russia’s MIRVed ICBMs are old with relatively little remaining life span and Russia cannot MIRV the SS-27 [missile] under the START Treaty. ... The issue of Russian MIRVed ICBMs was considered in the December 2001 Nuclear Posture Review¹³ and during the treaty negotiations. ... Today we do not believe the risk of an accident is determined by how many warheads are deployed on ICBMs. ... Under the Moscow Treaty, we will retain a nuclear force sufficiently flexible for our national security. ... Additionally, we will continue to work with Russia to better understand their planning process and intentions.”¹⁴

The guiding philosophy on this issue is that the United States and Russia no longer have the type of relationship that provides incentives to launch nuclear missiles. The Moscow Treaty gives the United States and Russia flexibility to determine the composition and structure of their strategic offensive forces, and how best to proceed with reductions.

Dismantlement of Warheads and Tactical Nuclear Arsenals

The Moscow Treaty does not call for the destruction of warheads that are removed from operationally deployed status. U.S. negotiators concluded that our interests in ensuring the safeguard and security of nuclear warheads from theft or diversion are nevertheless served by the Treaty.

Absence of a warhead elimination clause does not prevent the U.S. from destroying warheads removed from operational status under the Treaty. Furthermore, the Treaty prudently allows the U.S. to retain flexibility for unforeseen contingencies, reflecting the uncertainties of the post-September 11, 2001 future. Secretary Powell said this to the Foreign Relations Committee at a July 9, 2002 hearing on the Moscow Treaty:

¹²S. Hrg. 107-622, p. 109.

¹³For details on the Nuclear Posture Review, visit http://www.defenselink.mil/news/Jan2002/t01092002_t0109npr.html.

¹⁴S. Hrg. 107-622 p. 118.

“The first step in the destruction of any warhead is to take it off its missile, take it off its bomber, and then secure it as tight as we can to make sure it does not become a proliferating problem. ... There is no incentive to keep weapons we do not need.”¹⁵

In his October 21, 2002, letter about the Moscow Treaty to former former Foreign Relations Committee Chairman Joseph Biden, then-Armed Services Committee Ranking Republican Senator John Warner observed:

“A number of my colleagues in the Senate have raised concerns about what the Moscow Treaty does not do. The Treaty does not address warhead dismantlement or tactical nuclear arsenals. *No strategic arms control agreement has ever addressed these concerns* (emphasis added).”¹⁶

As noted above, the Moscow Treaty does not cover tactical nuclear weapons either. President Bush’s goal with the Treaty was to reduce operationally deployed strategic nuclear weapons. The U.S. has always been willing to discuss tactical nuclear weapons with Russia, but Russia has not always been willing to do so. Secretary Powell stated his intention to discuss the issue of tactical nuclear weapons during future arms control efforts with Russian counterparts.¹⁷ But if the United States had pursued tactical nuclear weapons reductions in the context of the Moscow Treaty, it is possible that the agreement would never have been concluded, and the opportunity to make historic reductions in strategic offensive warheads would have been missed.

Timing

The reductions outlined in the Moscow Treaty should take place within the 10 years stipulated in Article I. There are no benchmarks or “interim limits” by which to measure whether reductions are proceeding apace. The 10-year time period is designed to provide both Parties with enough flexibility to make decisions as strategic circumstances change and unforeseen contingencies arise. START I negotiations began in 1982, and that Treaty entered into force in 1994. START I reductions were completed in December 2001, well over 15 years after negotiations began. No other U.S. president has proposed unilateral strategic offensive reductions as steep and as rapid as President Bush. The “New Triad,” as discussed in the Nuclear Posture Review (see footnote 11), complements the Moscow Treaty. It is only prudent to build into the Treaty sufficient time to ensure that reductions take place in a sound and responsible manner.

¹⁵S. Hrg. 107-622, p. 11-12.

¹⁶Exec. Rpt. 108-1, p. 14.

¹⁷See, e.g., S. Hrg. 107-622, p. 12 (Powell) and S. Hrg. 107-622, p. 118 (Rumsfeld reply to question for the record).

Verification

In a major departure from arms control orthodoxy, the Moscow Treaty does not contain specific verification and transparency measures. Instead, as President Bush stated in his letter transmitting the Moscow Treaty to the Senate, the START I verification regime will serve as “the foundation for confidence, transparency, and predictability in further strategic offensive reductions.” A newly-formed U.S.-Russia Consultative Group on Strategic Security at the defense ministerial level will serve as “the principal mechanism through which the United States and Russia strengthen mutual confidence, expand transparency, share information and plans, and discuss strategic issues of mutual interest.”¹⁸

Withdrawal or Extension

The withdrawal clause requires only three months’ notice. Departing from past U.S.-Russia arms control practice, it does not require an assertion that extraordinary circumstances jeopardizing supreme national interests exist to justify withdrawal. In short, it is far more flexible than clauses in previous arms control agreements with Russia. According to the State Department’s Article-by-Article Analysis of the Moscow Treaty, this provision will permit greater flexibility for each Party to respond to unforeseen circumstances. The flexible withdrawal clause also reflects a belief by Treaty negotiators that circumstances unrelated either to the Treaty or to U.S.-Russia bilateral relations could prompt a decision to withdraw.¹⁹

The Resolution of Ratification

During the 107th Congress, Secretary of State Powell,²⁰ Secretary of Defense Donald Rumsfeld,²¹ and Senator John Warner²² each requested that the Senate adopt a “clean” resolution of ratification (i.e. attaching no conditions) for the Moscow Treaty. The resolution of ratification ordered reported on February 20, 2003 by the Foreign Relations Committee would attach two Conditions and six Declarations to the Treaty. Both of the Conditions and five of the six Declarations to some degree reflect recommendations made in the 107th Congress by the Armed Services Committee’s former Democratic Chairman, Senator Carl Levin.²³ The sixth Declaration is based on what has become known in Senate treaty practice as the “Byrd-Biden Condition.”

¹⁸Treaty Doc. 107-8, p. IV.

¹⁹Treaty Doc. 107-8, p. 9, ARTICLE IV.

²⁰S. Hrg. 107-622, p. 36, 39.

²¹S. Hrg. 107-622, p. 89.

²²Exec. Rpt. 108-1, p. 14.

²³Exec. Rpt. 108-1, p. 15.

A brief summary of the Conditions and Declarations included in the Committee-recommended resolution of ratification follows. In the Committee-recommended resolution, Conditions are styled as “binding on the President.” The Declarations are not binding, and as such, they are advisory. Neither the Conditions nor the Declarations would have to be included in the instrument of ratification deposited with the Russian Government in order to bring the Treaty into force, and they are not binding on Russia.

- Condition (1): this Condition requires the Executive Branch to report to the Senate annually on the role of Cooperative Threat Reduction and Nonproliferation Assistance. (see Exec. Rpt. 108-1, p. 18 for explanation)
- Condition (2): this Condition requires the Executive Branch to report to the Senate annually on implementation of the Moscow Treaty. (Exec. Rpt. 108-1, p. 19)
- Declaration (1): this Declaration (Exec. Rpt. 108-1, p. 19) is based on what has come to be known as the “Byrd-Biden Condition” on treaty interpretation. Senator Biden first introduced this resolution in 1987 to constrain the Reagan Administration’s ability to interpret the Anti-Ballistic Missile Treaty. President Reagan and subsequent Administrations have maintained that the Condition is unconstitutional.²⁴ Over the years, Senator Biden has insisted (with partial success²⁵) on including it in resolutions of ratification for treaties touching virtually all subject areas.
- Declaration (2): this Declaration encourages the President to encourage strategic offensive reductions in the future. (Exec. Rpt. 108-1, p. 20)
- Declaration (3): this Declaration informs the Executive Branch of the Committee’s expectation of briefings before and after meetings of the Bilateral Implementation Commission established by Article III of the Treaty. (Exec. Rpt. 108-1, p. 20)
- Declaration (4): this Declaration expresses support for Executive Branch efforts to achieve improved confidence regarding the accurate accounting and security of U.S. and Russian non-strategic nuclear weapons. (Exec. Rpt. 108-1, p. 21)

²⁴ See “Public Papers of the Presidents of the United States – Ronald Reagan, 1988, Book I,” pp. 661 and 760. For a discussion of the Byrd-Biden condition, see “Treaties and Other International Agreements: The Role of the United States Senate,” S. Prt. 106-71, p. 128.

²⁵For example, in the 107th Congress, examples of resolutions of ratification approved *without* the Byrd-Biden Condition include: Extradition Treaty With Peru (Treaty Doc. 107-6); Extradition Treaty With Lithuania (Treaty Doc. 107-4); and the Treaty With India on Mutual Legal Assistance on Criminal Matters (Treaty Doc. 107-3).

- Declaration (5): this Declaration calls for accelerated force reductions where feasible and consistent with national security. (Exec. Rpt. 108-1, p. 22)
- Declaration (6): this Declaration urges the President to consult with the Senate prior to extending, modifying, or withdrawing from the Treaty. (Exec. Rpt. 108-1, p. 22)

POSSIBLE AMENDMENTS

At press time, no amendments were known. It has been reported, however, that Senators Feingold or Levin may choose to offer amendments.

Senator Feingold reportedly wishes to impose a *binding* obligation on the President to consult with the Senate prior to withdrawal, amendment, or modification of the Treaty. Declaration (6) of the draft resolution of ratification *urges* the President to consult, but does not require it. In either event, whether binding or voluntary, such a provision very likely would be deemed by the courts to be unenforceable and an unconstitutional interference with the President's treaty powers under Article II of the U.S. Constitution.

Senator Levin reportedly wishes to amend the resolution (and thus the underlying treaty obligation) to include an explicit requirement that the United States and Russia destroy warheads that are removed from delivery systems under the Moscow Treaty. Apart from the policy reasons that militate against such a requirement (see *Dismantlement of Warheads and Tactical Nuclear Arsenals* above), as a matter of treaty practice, an amendment of this nature would be unusual in the bilateral context. It would have a profound effect on the underlying agreement. If the President signaled his rejection of the amendment by declining to deposit an instrument of ratification for this Treaty with Russia, or if the amendment were rejected by the Russian Duma, it effectively would preclude entry into force of the Treaty.